A

PP

v.

IBRAHIM SULAIMAN

B

HIGH COURT MALAYA, KUANTAN
HELILIAH MOHD YUSOF J
[CRIMINAL TRIAL NO: 45-14-2003]
28 AUGUST 2008

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking offence - Allegation of - Prima facie - Whether established - Whether prosecution's evidence gave strong inference capable of establishing prima facie case independent of presumption under s. 37(da) Dangerous Drugs Act 1952 - Whether inference of transporting drugs irresistible -*

D

Defence - Whether defence given credible or vague - Whether defence failed on balance of probabilities to cast reasonable doubt on prosecution's case

The accused was charged with a drug trafficking offence under s. 39B(1)(a) Dangerous Drugs Act 1952. On 1 December 2003, an ambush party was arranged at a Petronas petrol station situated at Balok Makmur, Beserah, Kuantan. At about 7.45pm of the same day, PW4, who was leading one of the police team observed the targeted car, a White Iswara Aeroback bearing registration number DAF 4859 entering the area and stopping beside the road in front of the Petronas petrol station. A Malay male was seen emerging from the driver's seat. The Malay male was apprehended and PW4 testified that he had immediately administered the caution pursuant to s.37A(1)(b) of the Dangerous Drugs Act 1952 (DDA 1952). Upon physical examination of the suspect a car key was found on his person. After examining the car PW4 then opened the boot of the car and found six black plastic bundles. Upon tearing one of the plastic bundles he found a slab wrapped in clear plastic inside which was found a tin foil tied with a red coloured string. Inside this wrapping were seen leaves suspected to be ganja. It was discovered that each of the black plastic contained eleven similar slabs in all of which were similarly wrapped the suspected ganja. It was also in the evidence of PW4 that after the caution was administered, the suspect (namely the accused) had said "Tuan kita bincang di sini sahaja, saya tak buat apa-apa" and that at the time he was apprehended he had looked startled. A proper analysis of the substance was undertaken by a qualified chemist PW3 and the result of his analysis was that there was a total

E

F

G

H

I

amount of 61,159.0gm of cannabis as defined under s. 2 of the DDA 1952. The thrust of the prosecution's case was the fact that the accused was the person who had signed the form for purposes of hiring the car, was seen driving away in the car and the said car with the same number was subsequently apprehended in Pahang. The accused was the only person seen by the police alighting from the car. The deputy public prosecutor submitted that there was evidence of custody and control. At the end of the prosecution's case the brunt of the submission for the defence was that there was no nexus between the accused and the cannabis found in the boot. The arguments, *inter alia*, were (i) the accused at the time was merely a hirer of the car. He had rented the car from PW10, an operator of a car rental service; (ii) that the car was actually hired at the request of one G alias Abang Mat, a trader in apparels, who had requested the accused to assist him and drive on a trip to Kuantan as G could not do so on account of his driving licence having expired; (iii) that having arrived at a junction near Jabor, G purportedly wanted to stop to meet a friend and had instructed him to refill the petrol for the motorcar. The question here was whether on the totality of the case for the prosecution, a *prima facie* case had been established by the prosecution.

Held (convicting the accused):

(1) The accused was seen alone when he drove the car to a stop and alighted. The car was positively identified by the owner to be the car hired by the accused. The words uttered by the accused to PW4 after he administered the caution fell within the scope of s. 37A(1) DDA 1952. However, these words in the context in which he was apprehended, namely, somewhat surrounded by the police team may still be innocuous although he did display that he was startled. The evidence led by the prosecution which indicated that the large amount of drugs were carried into the boot of the car gave a strong inference capable of establishing a *prima facie* case independent of the presumption under s. 37(da). The facts of this case also provided a position where reference could also be made to s. 106 of the Evidence Act 1950. (para 14)

(2) The scope of the DDA 1952 is intended to prohibit the unauthorized dealing of drugs. With such large quantities being transported from one state to another anyone found transporting the substance should be in a position to provide

A a credible explanation and also to co-operate as much as possible. The accused was found alone in physical control of the car. The inference that he was transporting the drugs was irresistible. (para 15)

B **(3)** DW1's version of G itself seemed vague. G was supposedly known to DW1 for quite a time and yet he was unable to explain what he understands by being a trader in apparels. No apparels were found although he stated that he thought the bags contained clothes. That belied the fact then that he did C not know at all of the existence of those plastic bags in the boot of the car. Further, the defense version that G had wanted to go to Kuantan to trade in apparels did not seem to be supported in view of the complete absence of any other trade items that would lend credence to the defence version D that DW1 was but an innocent carrier. G, even if he existed, appeared to be an unknown factor which would not assist to exonerate DW1 in the absence of any further credible explanation from DW1 as to the role of G, and any connection between G and the drugs. (para 22)

E **(4)** The explanation furnished by DW1 had failed on a balance of probabilities, to cast a reasonable doubt on the case for the prosecution. DW1 was found guilty of the offence as charged. He was convicted. He declined to submit any plea in F mitigation. The mandatory sentence as provided pursuant to s. 39B(2) was imposed. (paras 23 & 24)

Case(s) referred to:
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 ***(refd)***
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
G *PP v. Johar Mustaffa [2004] 5 CLJ 187 HC* ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37A(1)(b), 37(d), (h), (da), 39B(2)
H Evidence Act 1950, s. 106

For the defence - Bob Arumugam; M/s Bob S Arumugam & Co
For the prosecution - Ahmad Rosli Sham; DPP

Reported by Suhainah Wahiduddin
I

JUDGMENT

Heliliah Mohd Yusof J:

[1] In this criminal proceedings the charge reads:

> Bahawa kamu Ibrahim bin Sulaiman, KPT: 611010-03-5067, pada 1 Disember 2002, jam lebih kurang 7.45 malam, di kawasan hadapan stesyen minyak Petronas, Balok Makmur, Kuantan, dalam daerah Kuantan, di dalam negeri Pahang, didapati mengedar dadah berbahaya cannabis, berat 61,159.0 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Pindaan 1998) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The Prosecution's Case

[2] On 1 December 2003 PW4 the Ketua Bahagian Narkotik IPD Kuantan at that material time gave a special briefing to two other police officers and sixteen other police personnel at about 5pm. At that briefing information was disclosed that a certain ambush party was to be arranged at a certain place during which a car that is a Proton Iswara Aeroback (white in colour) bearing registration number DAF 4859 was to be detained.

[3] At about 6.45pm three police teams took their position at a Petronas petrol station situate at Balok Makmur, Beserah, Kuantan. At about 7.30pm the three teams took their position at the anticipated location. The location was described as fairly deserted with little activity and no conveyances as it was the month of Ramadhan and it was about the time that people would be breaking fast.

[4] At about 7.45pm PW4 who was leading one of the police team observed the targeted car that is the white Iswara Aeroback bearing registration number DAF 4859 entering the area and stopping beside the road in front of the Petronas petrol station. PW4 saw a Malay male alighting and emerging from the driver's seat. At that time PW4 and his team then emerged. With the aid of two of his teams members the Malay male was apprehended and PW4 testified that he had identified himself, displayed his authority card and immediately administered the caution pursuant to s. 37A(1)(b) of the Dangerous Drugs Act 1952 (or DDA 1952). Upon the physical examination of the suspect a car key (P8) was found on his person. After examining the car PW4 then opened the boot of the car and found six black plastic bundles.

A Upon tearing one of the plastic bundles he found a slab wrapped in clear plastic inside which is found a tin foil tied with a red coloured string. Inside this wrapping were seen leaves suspected to be ganja. It was discovered that each of the black plastic contained 11 similar slabs in all of which were similarly wrapped
B the suspected ganja.

[5] It was also in the evidence of PW4 that after the caution was administered the suspect (namely the accused) had said: "Tuan kita bincang di sini sahaja, saya tak buat apa-apa" and that
C at the time that he was apprehended had looked startled. PW4 upon cross examination had maintained that those were the words uttered by the accused.

[6] PW8 testified that he is the owner of motorcar DAF 4859
D but on the material date 1 December 2002 he had been away in Mecca and the car had been entrusted to his son. PW9 the son of PW8 gave evidence that on 1 December 2002 he had been using the car DAF 4859. On that day he had received a phone call from his elder brother PW10 who operated a car rental service
E to send the car to Kok Lanas (Kelantan) where he operated the service. PW10 is the older son of PW8 and who runs business including the car rental service. He confirmed that he had made a request to PW9 for the car to be sent to his place as there was a person who had expressed interest to hire the car. At about
F 3pm on 1 December 2002 a person whom PW10 identified as the accused, and with whom he had not been previously acquainted, had met him at his work place in the company of another person who was also not known to PW10. P19 was the form that was then filled by the accused for the purposes of hiring the car.
G According to PW10 the car was to be hired for one day for the amount of RM90 and also for the purpose of going to Kuantan. The key to the car was given to the accused and he was seen driving it away.

[7] The evidence of PW1 the investigating officer was that in the
H course of questioning the accused, the latter had not informed him that he was visiting a relative or that he had taken a lift from someone by the name of G @ Abang Mat.

[8] A proper analysis of the substance suspected to be ganja
I was undertaken by a qualified chemist PW3 who certified that an analysis was made of all the slabs (total 66) and the result of his analysis was that there was a total amount of 61,159.0 gm of cannabis as defined under s. 2 of the DDA, 1952.

[9] At the end of the prosecution's case the brunt of the submission of the learned counsel for the defence was that there was no nexus between the accused and the cannabis that were found in the boot. The argument was that the cannabis were not found in a special compartment and the accused at that time was merely a hirer of the car. It was also submitted that it was not in evidence that PW10 had not opened the boot to show that it was empty and that PW4 had not testified that the boot had smelt of ganja. These latter arguments are directed towards the premise that there was no direct or circumstantial evidence to indicate the accused had knowledge of the existence of the cannabis in the boot of the car. In addition it was also contended that there were breaks in the chain of evidence in the handling of the exhibits. It was further contended that there was no evidence of fingerprints.

[10] This last argument is unfounded. Learned counsel for the defence attempted to argue that there was no proper handling of the drugs since there was a press conference held by the police where the drugs were displayed. This was an attempt to persuade the court that there was opportunity for some form of tampering with the drugs. This is also found to be without merit. These aspects of the arguments for the defence in questioning the details as to how the drugs were handled from the time they were found, handed over to the investigating officer and to the chemist, as well as the need to have fingerprint evidence have in a similar way been addressed in *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551. The relevant passages are to be found in the grounds of judgment delivered by Abdul Hamid Mohamed JCA (as he then was) (see pp. 568, 569, paras g, h, i, a, b, c, d).

[11] It is also found that in the circumstances of the case it is not relevant to consider the applicability of the s. 37(d) or s. 37(h) of the DDA 1952. According to learned counsel for the defence there was absent here direct or inferential evidence of custody or control over the drugs since the car was hired.

[12] The question here is whether on the totality of the case for the prosecution, a *prima facie* case has been established by the prosecution.

[13] The thrust of the prosecution's case was the fact that the accused was the person who had signed the form for purposes of hiring the car and driving away in the car. The car with the same number was subsequently apprehended in Pahang outside of

Kelantan and the accused was the only person seen by the police alighting from the car. The learned deputy public prosecutor has submitted that hence there was evidence of custody and control having referred to *PP v. Johar Mustaffa* [2004] 5 CLJ 187. This was a case where a large quantity of the drugs were being conveyed from one place to another and thus suggesting that it could not even have included the possibility of personal use. Learned counsel for the defence in raising the arguments that there was no nexus between the accused and the offending drugs is suggesting that s. 37(d) should not be invoked. However if s. 37(da) were to be applicable it is now established that there must be an affirmative finding of the fact of possession. *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713.

[14] The accused was seen alone when he drove the car to a stop and alighted. The car was positively identified by the owner to be the car hired by the accused. The words uttered by the accused to PW4 after he administered the caution fall within the scope of s. 37A(1) DDA 1952. However these words in the context in which he was apprehended, namely, somewhat surrounded by the police team may still be innocuous although he did display that he was startled. The evidence led by the prosecution which indicated that the large amounts of drugs were carried in the boot of the car gave a strong inference capable of establishing a *prima facie* case independent of the presumption under s. 37(da). The facts of this case also provide a position where reference could also be made to s. 106 of the Evidence Act 1950:

> **Burden of proving fact especially within knowledge**
>
> **106.** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> ILLUSTRATIONS
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[15] In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978-1979] SLR 211 at 217-218; [1980] 1 MLJ 49 at p. 52):

> Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

The scope of the DDA 1952 is intended to prohibit the unauthorised dealing of drugs. With such large quantities being transported from one state to another anyone found transporting the substance should be in a position to provide a credible explanation and also to co-operate as much as possible. The accused was found alone in physical control of the car. The inference that he was transporting the drugs was irresistible.

[16] The accused was called to enter his defence which he chose to give under oath. The defence was that the car was actually hired at the request of one G alias Abang Mat. The latter was said to be staying in the same kampung as the accused. G was said to be dealing in the sale of apparels. According to the accused (DW1) G had requested him to render assistance to drive on a proposed trip to Kuantan as G could not himself do so on account of his driving licence having expired.

[17] The defence of DW1 was that he had signed the forms for the rental of the motor car but that the money for that purpose was given by G. His version of the evidence differed slightly from PW10 in the sense that DW1 stated that he had driven away from PW10's place in his own car while G or Abang Mat drove the car that was hired. According to DW1, G was supposed to fetch him from his own house before leaving for the proposed trip to Kuantan. This aspect was never put to PW10 in cross examination for PW10 had earlier testified that DW1 was the person seen driving away the car. DW1's version was that having arrived at a junction near Jabor (in Pahang), G purportedly wanted to stop to meet a friend and had instructed him to refill the petrol for the motor car after having given him RM50. According to DW1 that same friend of G had taken G in the former's car apparently to go somewhere to break fast. G, according to DW1 was supposed to join him later. DW1 having found his way apparently through Kemaman stated in cross examination that he

was not familiar with Balok Makmur where he was arrested. DW1 also gave the explanation that he had intended to use the opportunity to go to Kuantan to meet a relative one Sgt. Aziz bin Mat who was called to testify as DW2. DW2 turned out to be cousin of DW1. There was nothing that he stated that supported DW1's evidence that DW1 was indeed on his way to meet him (DW2). His only evidence was to provide the address of DW1 in Kelantan.

[18] In his submission at the end of the case for the defence, learned counsel contended that the consistency in the statement of DW1 indicated that a person by the name G existed and was not a fictitious person. The court was invited in effect not to accept the evidence of PW10 that he had only seen a person accompanying DW1 at the time of hiring the car. DW1's version was that G had sat outside (ruang tamu). Mention was made of a person by the name of Sauli who according to the defence should have been called. According to PW10 Sauli merely contacted the brother of PW10, PW9 to return the car as it was in his possession to enable the car to be rented out. According to SP10 Sauli was not at all involved at the time the forms were being filled by DW1. It is found that the absence of any evidence from Sauli did not create any gap in the prosecution's case. *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1. PW10 was not even cross examined on the question that he saw DW1 driving the hired car himself. The evidence of PW10 refutes the evidence of DW1 that he drove away from PW10's place in his own car. The evidence of PW10 is accepted.

[19] It was also further submitted that DW1 had established that G existed since the prosecution had not challenged the evidence of the defence. PW1 the investigating officer in the case had denied in cross examination that DW1 had told him about the existence of G and he had not gone to DW1's kampung to investigate. PW4 in cross examination did indicate that G had been mentioned. The court however is not in a position to comment on this aspect of the case that is whether the police had conducted investigations poorly or otherwise. PW10 had testified that DW1 at the time of hiring the car, had been there with someone whose identity was not made known to him.

[20] However the defence version that G had wanted to go to Kuantan to trade in apparels did not seem to be supported in view of the complete absence of any other trade items that would lend credence to the defence version that DW1 is but an innocent carrier.

[21] While alleging gaps in the prosecution's case it is also noted as contended by the learned deputy public prosecutor, that DW1 also gave statements which may not be plausible. He was vague about the reason to go to Kuantan, namely whether to drive G or to visit a relative. On the one hand he had stated that he had work the following day and on the same token he was supposedly intending to proceed to Kuantan. The question was also raised that it seemed odd that the time being in the fasting month, if G did exist, G did not even suggest that they should break their fast together and should instead choose to join a friend.

[22] DW1's version of G itself seemed vague. G was supposedly known to DW1 for quite a time and yet he was unable to explain what he understands by being a trader in apparels. No apparels were found although he stated that he thought the bags contained clothes. That belies the fact then that he did not know at all of the existence of those plastic bags in the boot of the car. The court is aware of the useful guiding lines given in *Mat v. PP* [1963] 29 MLJ 263 in considering the defence case. G even if he existed appears to be an unknown factor which would not assist to exonerate DW1 in the absence of any further credible explanation from DW1 as to the role of G, and any connection between G and the drugs.

[23] At the end of the case for the prosecution, it is found that the explanation furnished by DW1 has failed on a balance of probabilities, to cast a reasonable doubt on the case for the prosecution.

[24] DW1 was found guilty of the offence as charged. He was convicted. He declined to submit any plea in mitigation. The mandatory sentence as provided pursuant to s. 39B(2) was imposed.